

Civil disobedience as a constituent/dis-instituting power

Desobediência civil como poder constituinte/desinstituinte

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Resumo

Neste artigo, pretendo apresentar uma nova interpretação da desobediência civil com o objetivo de revelar seu potencial na construção de uma democracia radical anticapitalista. Depois de discutir as diferenças entre poder constituinte e desinstituinte, ambos ativados pela desobediência civil, o estudo conclui indicando algumas características e formas de desobediência civil que podem ser vistas como exemplos de um poder constituinte e desinstituinte.

Palavras-chave: Desobediência civil, Estado de exceção econômico, Poder constituinte, Poder desinstituinte, Democracia radical.

Abstract

In this paper, I aim to present a new interpretation of civil disobedience with the objective of revealing its potential in the construction of an anti-capitalist radical democracy. After discussing the differences between constituent and dis-instituting power, both of which are activated by civil disobedience, the study concludes by indicating some of the characteristics and forms of civil disobedience that can be seen as images of constituent and dis-instituting power.

Keywords: Civil disobedience, State of economic exception, Constituent power, Dis-instituting power, Radical democracy.

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Constituent/dis-instituting power

This text is intended to develop the idea of civil disobedience as a meeting point between constituent power and *dis-instituting* power. This study will examine the relationship between these two traditions from a new angle, in order to deepen the current critique of – and fight against – capitalism. It is important to note at this stage that my use of the term ‘dis-instituting power’ differs both from Agamben’s “destituent potential” (*potenza destituente*) and Raffaele Laudani’s “destituent power” (*potere destituente*). In the introduction to *Disobedience in Western Political Thought: A Genealogy* it is made clear that Laudani’s concept of destituent power bears no relation to the tradition of civil disobedience. In fact, he classifies this tradition, originating in the 1970s, as a “mistake”, a mere liberal attempt at limiting and taming destituent power. Moreover, Laudani admits that his concept of destituent power is not hostile towards existing institutions of the current political-legal order, classifying it not as anti-institutional, but rather as extra-institutional. There are, therefore, two important differences to be highlighted between the proposition set out in this study and Laudani’s concept. Dis-instituting power, as understood in this article, is specifically related to the rejuvenation of the civil disobedience tradition today, irrespective of its liberal roots, and is clearly an anti-institutional proposition.

It is also important to clarify that this understanding of dis-instituting power is not to be confused with Giorgio Agamben’s notion of destituent potential, despite their resemblances. This comes down to one simple, fundamental reason: Agamben conceives of destituent potential as what he calls pure “inoperativity”. By inoperativity he does not mean inertia, but rather an activity capable of deactivating both the legal and political mechanisms, which are marked by their inherent violence, freeing up these mechanisms for new utilizations. Agamben conceives of *destitution* as a reality that has no connection to institutions, i.e., the production paradigm. Thus, inoperativity means “not to operate”; that is, ceasing production. Within this idea we see the possibility that all constituent power derives from the original sin of violence and the division between an ordered dimension – *archic* – and a disordered one – *anarchic*. Based on this interpretation, Agamben presents the dualisms of *potestas* and *auctoritas*; life and law; non-political and political life; human and animal; kingdom and glory, among many others (Agamben, 2015, p. 334-336). From these dyads stem an exceptive structure, which renders them indiscernible by incessantly exerting power over them. This divides factitious experience through a movement of exclusive inclusion, according to which a specific dimension – fundamental rights, for example – can be conceivable or politically relevant only insofar as it is differentially included in the system as an *ex-capere* (“taken outside”, *ex-ceptio*) to the exception itself. In the given example, this implies that rights can only be guaranteed through legitimization of the State’s violence, which affirms them.

According to Agamben, a constituent power capable of transforming the legal-political reality – as in the Western tradition since the French Revolution – means nothing more than a change of lords and masters, since a power overthrown by constituent violence will only rise again under a different form. Under such a hypothesis, the dialectic between law-making violence (constituent power) and law-keeping violence (constituted power) has not been deactivated. Thus, for Agamben, constituent and constituted power form one system, so that the constituted is founded on the constituent. The constituent – initially seen as a power that occurs outside the State and which continues to exist even after being constitutionalized – is eventually subsumed by the instituted power, surviving only as the power to revise the Constitution, as clearly stated in Sieyès’ classical definition (Agamben, 2015, p. 336-337). In

order to avoid such paradoxical redundancy, Agamben's theory demands we abandon the symbiotic and repeating system of constituent/constituted power and instead turn to the radical inoperativity of destituent potential, as it does not produce work (*opera*) – and is, thus, not violent – but only deactivates already existing works, preparing them for a new usage in accordance with what Walter Benjamin calls destitution (*Entsetzung*) (Agamben, 2015, p. 339-341).

However, there are a number of misconceptions in Agamben's argument, which will now be examined. First, this symbiotic relationship between constituent and constituted power is a historical fact, and not an ontological one. It would certainly be possible to create and activate a constituent power which, as indicated by its name, would not be subsumed or limited by the constituted power. Imagine a permanent constituent power, permanent in the sense that it will never give way to fixed institutions which could be legitimized under the label of the "constituted power". Imagine further that this permanent constituent power has no hierarchical relationship with the constituted power and opposes itself to it. There is no reason to assert that every institution will necessarily propagate the original law-making and law-keeping violence of the *arché*. It is thus fundamental to conceive of a dis-instituting power capable of deactivating the institutions of capital, State and market. Such a power, unlike Agamben's destituent potential, is closely related to constituent power, not the former represented a logical step towards the latter, but because the dis-instituting power is a necessary structure, required to destroy the constituted power and substitute it for a permanent and continuous constituent power.

Agamben believes that the dialectic between the constituent power and the constituted power must be abandoned completely through destituent potential, whereas the proposition outlined here aims to break the historical and rhetorical links between the constituted and the constituent power, releasing the latter from the former. In order to accomplish this, a dis-instituting force is required, one that goes against both the institutional and concrete aspects of capitalism and of the State, making room for the production of new subjectivities, new uses and new forms of law, which will stem from the permanent constituent power. Unlike in Agamben's theory, this should not be seen as a mere expression of the violence of the *nómos*. On the contrary, the constituent power, as an originally rebellious force, involves a productive surplus that cannot be contained by the institutional mechanisms of the constituted power (Negri, 2015, p. 19-20).

Dis-instituting power can be understood as an escape or exodus from the institutional forms through which the contemporary political-economic power expresses itself, translated into institutions such as the State, banks and global markets. Though every constituent act necessarily involves dis-instituting dynamics, the radical nature of this critique intends to highlight that the entire current political and legal system requires dis-institution under its own terms, bearing in mind that it is not a mere logical step towards future constitutions.

The desire for freedom does not translate into the dialectic between constituent and constituted power; rather, it concerns the horizontal relationship between the dis-instituting power and the permanent constituent power. If the historical ascension of Western law was indeed grounded in violence-based hierarchy and appropriation – which is undeniable – it does not necessarily follow that it must remain so, and that all productiveness is marked by this *arché*. By perpetuating such a thesis – i.e., the indissolubility of the existing bond between violence, production and constitution – history can be mistaken for ontology, blocking concrete possibilities for social change. Things do not have to remain as they are, for history is the work of mankind and not an external and endlessly self-replicating form. Amongst these ontologies, as Agamben is perhaps aware, there remain those which allow for possibility,

openness and “preferring not to”, in the words of *Bartleby the Scrivener*. The eternal productive struggles of the oppressed for an *an-archic* reality – that is, one that does not separate, appropriate and establish hierarchy – are founded upon such possibilities.

While every political action involves inherent risk, circumstances are not entirely down to chance. The constitution of new political and legal structures through popular constituent power, which necessarily begins with the dis-institution of the old capitalist forms, indicates the assumption of a new world view by the true holders of political power. The rejection of what is there – the apparatuses established by capital and based on hierarchy and appropriation – is equivalent to the creation of a reverse route. There is the sense of an open future in which nothing is taken for granted, but where continuing to live under a global political-legal-economic system which threatens the very physical existence of the planet becomes an impossibility. In other words, one cannot know what will stem from constituent power, since its potentialities are immeasurable and relatively undetermined. Nonetheless, one may assert, based on the possibility of dis-instituting power, that this new world need not resemble the current capitalist system.

In contrast to constituent power – which, in the modern paradigm, corresponds to the idea of sovereignty, with the unpredictable potential to create new forms that cannot be known in advance dis-instituting power presents itself as negative content. It has the possibility of being updated by denying the structures of existing institutional apparatuses. In fact, even if the material reality of a post-capitalist world is presently unknowable, in order to conceive of it, one must abandon the historical project of conquering the structures of the State, as well as the powers that intend to make us think we live under “respectable democracies” (Jappe, 2015, p. 121).

As Furio Jesi accurately notes in his legendary study on the symbology and mythology of revolt, one of the most appalling accomplishments of capitalism is the transformation of its own structures into effective patterns and symbols of strength. In this dynamic, all organizations that criticize and try to defeat it, such as left-wing parties and unions, feel inexorably compelled to reproduce its forms, as if they existed outside of history and represented non-contingent symbols of power (Jesi, 2014, p. 87-88). Like all false mythologies, the one concerning capitalist power in fact corresponds to a mere historical accident, without involving any extra-historical truth. In this context, the dis-instituting power becomes a force where the creation of space for new possibilities makes the process of historicizing capitalism possible and, therefore, makes room for radical critique and debate around it. In order to fulfill this role, the dis-instituting power needs to be conceived under the terms of its own ontological radicality, and not as a simple negative simile of the constituent power, especially when the latter is understood as the sovereign assertion of peoples or States, as is generally asserted by constitutionalists. A new political lexicon is needed so that the term “sovereign” – and especially the mytheme “sovereign people” – becomes inactive, improper, inauthentic and useless for any purpose other than domination and social division.

This point is important and should not be underestimated. It seems dangerous to conceive of constituent power in a formal and empty way under the modern constitutional paradigm of sovereignty, whose greatest theorist was Carl Schmitt. Due to its openness and indeterminacy, the constituent power could create any type of society. This demonstrates that constituent power is certainly not a remedy for all ills, and its action could even lead mankind into a more authoritarian regime than those imposed by capitalism. Such a consequence would be inevitable and would, in fact, constitute the political character of the constituent power. Indeed, the concept of politics is not to be identified with the definition and

characterization of the enemy, but rather with an attempt to order the contingency and indeterminacy typical of social structures. Thus, political action involves an inherent gamble. That is the true tragic nature of constituent power.

Nevertheless, as previously stated, this is not a blind bet. If constituent power is based on indeterminacy and openness, and may therefore result in any social arrangement, some possibly worse than capitalism, then it is necessary to guarantee a minimal level of security. According to this proposal, confidence in this risk can only be guaranteed when conceiving of – and practicing – constituent power in relation to dis-instituting power. Unlike constituent power, dis-instituting power is neither open nor indeterminate, but actually configured by the reality it denies. The dis-instituting power is defined by existing institutions, continually presenting an inversion. What the dis-instituting power dis-institutes is the minimal basis upon which the constituent power will start acting. Indeed, the constituent power could be anything, apart from what has been denied by the dis-instituting power, in the case of a coherent political project being at stake. Following a similar line of thought, Antonio Negri states that, currently, the constituent power should not be conceived of as an empty potentiality, since there is no “inside” and “outside” in post-modernity: every political force is closely attached to the present historicity. Thus, the meanings of the constituent power will always be determined by the resistances and singularities against which it collides (Negri, 2015, p. 19).

Institutions such as the State, banks, stock exchanges, private property, inheritance and contracts, after having been dis-instituted, cannot be reconfigured by the constituent power, whose infinite malleability will confront the limit of the order previously denied by the dis-instituting power. Thus, it is possible – though not without risks – to seriously consider the wish to build a more decent society, different from the dis-instituted one. The dis-instituting power provides a guarantee against a return to capitalism, opening up a vast field of possibilities in which – even though nothing can be taken for granted – some alternatives are necessarily excluded, having been proven to be unacceptable from an ethical point of view. For example, there can be no ethical justification for subjugating 99% of humanity to the 1% of individuals and companies which dominate political and economic power. Some possibilities have also been proven to be inefficient from the point of view of productivity – free labor produces common value or goods in greater quantity and with more quality than capital can, as it is nowadays limited to an unpredictable valorization of capital in perverse financial, rentier and virtual forms.

Civil disobedience

José Antonio Estévez Araujo understands civil disobedience to be illegal, public and non-violent action, whose aim is to change a certain law or governmental policy (Estévez Araujo, 1994, p. 22). According to this definition, it seems that civil disobedience can only be practiced under the terms of a given legal system, respecting it in general and aiming only to change certain specific aspects of it. This understanding of civil disobedience has been developed by many authors dealing with this subject in the context of the constituted power.

The above definition notwithstanding, even some theorists who understand civil disobedience to be the expression of constituted power recognize that it can, in extreme circumstances, turn into criticism of the political and legal system as a whole, as the disobedient actions demanded by Gandhi clearly demonstrated – initially focusing on discriminatory policies implemented by the British government, they developed into a

campaign against the whole colonial system to which India had been subjected (Arendt, 1972, p. 77; Estévez Araujo, 1994, p. 28-29).

This situation demonstrates that civil disobedience, more than a self-correction mechanism for constituted law, can work as an expression of a constituent power put to marching by a dis-instituting power, as seen above, since it exceeds the given positive law, presenting itself as a true legal source, and not as a result or product of the system. For civil disobedience to fulfill this role, the presence of specific circumstances is needed; from the point of view of this article, it must be adequately grounded in a radical-democratic idea of law. The given hypothesis is that nowadays these circumstances exist in the form of a *state of permanent economic exception*. More than simply colonizing the rule of law, the economic exception has transformed it. It seems that a point of no return has been reached, resulting in the rapid dismantling of liberal rights and guarantees. Although they have never functioned at their maximum potential, like many other human endeavors, liberal rights and guarantees have played an important historical role by partially voicing the plight of the exploited and oppressed in political debate and experience.

It is important to underline that civil disobedience is not the only – and perhaps not even the most important – structure through which the constituent power expresses itself. There are many other forms of expression, both passive (such as a revolutionary general strike) and active (insurrection, armed resistance, revolution, etc.), whose objective is the transformation of the political-legal-economic system of exception as a whole. Many of these forms of constituent power resort to violent methods which, however, are not illegitimate *per se*.

The ideas outlined by Schmitt and Benjamin on the symbiosis of law and violence cannot be overlooked. Indeed, the normativity we are now familiar with stems from original acts of land appropriation (Schmitt, 1974), which were then justified through mythologizing and moralizing metaphors. Meanwhile, the legal system monopolized the use of violence, now understood to be the absolute property of law (Benjamin, 1999). Nonetheless, one cannot forget the historical (and not ontological) character of Schmitt's and Benjamin's theses, since they concern a specific experience of law – the Western one, which first appeared in Greece and currently manifests itself as capitalist law based on appropriation – and not all possible legal experience.

Power and normativity, rather than violence and hierarchy, are the key elements in all legal spheres. If, in the present system, these dyads are often mistaken for one another, this is due to the identification of what exists – capitalist law – with what *can* exist; i.e., other forms of law. If we take Agamben's invitation to “the coming generation” to conceive of a legal paradigm in which violence is genuinely disabled, then civil disobedience stands out from the multiple constituent forms of this new legal experience precisely due to its non-violent character. In mystical terms, it does not accumulate *karma*, nor activates the mechanism of capitalist law – which always requires more violence in order to justify its grounds and consequences. From this perspective, civil disobedience can be understood as a radically argumentative legal institution – more than any argumentation theory linked to the constituted powers, which are violent by nature, could ever admit.

Estévez Araujo classifies the traditional conceptions of civil disobedience by stating that one can either understand them as a form of *constitutional review*, whereby the constitutional validity of a certain law is directly questioned through an act of disobedience, or as the *direct exercise of rights already recognized by the Constitution*. This occurs, for example, when the disobedient ignore an official prohibition to protest and demonstrate. While *constitutional review* takes an active approach to legislative power, the *direct exercise of rights* adopts a more passive approach, turning against the measures and decisions of the judicial or executive

powers. It is vital to note that in both situations the disobedient question the weighting of values and principles by the public authorities in their creation or enforcement of laws, in order to show that certain opinions, circumstances and points of view have not been adequately considered (Estévez Araujo, 1994, p. 144-145). Clearly, these understandings of civil disobedience are rooted in the need to activate public opinion, compelling it to amend decisions made by the three classical branches of sovereign power. However, the deeply antidemocratic nature of such power remains in its essence, unquestioned.

While any relevant legal-political transformation necessarily undergoes the mediation of the market and State-capital powers, *dis-institution* sponsored by civil disobedience is essential to ensure the continuity of *constituent power*. It is an important – although not the only – way to fight for the constitution of truly democratic “rights to come”, which are not based on the proprietary and violent *nómos*, which – explicitly or implicitly – marks the post-modern experience of normativity.

It is clear that conceptions which reduce the function of civil disobedience to scenarios of institutional normality should fail, since they see civil disobedience as an outlet or, at best, a self-correcting or self-integrating mechanism of the law. In these cases, the disobedient action is constrained to assuming the validity of the current political and legal structure as a whole, questioning only specific aspects without addressing a general *dis-institution* of the system.

Nonetheless, the situation in which the democratic rule of law is immersed today can only be understood on the basis of permanent economic exception, in which the union of State, finance and the market is evident. This union makes a *de facto* determination of the anti-popular direction of policies and the limitlessness of private capitalist power, as well as the sidelining of historical achievements attained by movements, originating in the 18th century fight for rights and later radicalized by workers, black rights groups, feminists and others during the 19th and 20th centuries.

In this context, understanding civil disobedience merely as a self-correcting device of the constituted power denies its transformative and democratic potential. It is seen as one of the various technical mechanisms controlled and approved by the State/market, and can only play a rhetorical role, demonstrating the so-called normality of a legal system that has long been exhausted. Indeed, this system is now immune to the possibility of any real reform capable of putting at stake the privatist, selfish and individualist grounds on which it is based, as demonstrated by the socio-political crisis currently ravaging Brazil. It seems not only inappropriate, but also contradictory to derive the foundations of civil disobedience from the principles of a *nomic-proprietary* system historically based on separation, hierarchy and violence – characteristics entirely opposed to the defining traits of civil disobedience, which is public, horizontal and peaceful. In the current system, it is critically urgent to develop radical politics, capable of proposing something other than a new form of violence, even if it is not monopolized by the proprietary *nómos*. This is the only way to escape from the total subjection engendered by late-capitalism, by which the contemplative subjection guaranteed by the society of the spectacle justifies itself and remains bound to the legalized and institutionalized violence typical of the state of exception. In the imperial world of permanent economic exception, production and action need to be absolute, uninterrupted and irreflexive. This is why every violent resistance imposed on the system makes it stronger, by activating new control and subjection mechanisms.

In fact, the state of exception can only survive and thrive if it is constantly justified by resistance, which questions it and, thus, paradoxically, necessitates and maintains it. In opposition to Foucault's ideas, resistance is not in fact the other side of power, but power itself. Resisting the state of exception, despite there being good reasons and arguments to do

so, is only a way of activating the power which rests in the productive and reproductive action of a divided social world. From this perspective, “undergoing a rebellion is not an effective alternative against the permanent exception, for non-stop rebelling is the most important rule imposed by such exception” (Valdencantos, 2014, p. 156). This is clearly demonstrated by the social struggles of 2011-2013, which spanned the US, Latin America and Europe. While the explosion of popular indignation was primarily seen as legitimate, it was soon used to justify an unprecedented deepening of the exception, at least in so-called “democratic” States. For example, due to the notorious *Ley Mordaza* in Spain, many laws and administrative measures which criminalized the public questioning of the capitalist order were approved, including the absurd violation of fundamental principles such as the presumption of innocence, the due process of law, the right to information, the right to privacy and the right to protest.

In Brazil, this process was particularly clear. After the shock of the 2013 protests, when a series of acentric, horizontal and spontaneous movements took over the streets of major Brazilian cities, hampered the progress of the Confederations Cup and prevented an increase in public transport fares, the exceptional power was able to portray such movements as symbols of barbarism and disorder, later engineering containment, intimidation and control structures seldom experienced previously in the country. It was thanks to these structures that the World Cup took place in Brazil without any major incidents. However, the apparent victory resulting in the retreat of the State and its economic partners from the increase in public transport fares in 2013 was rapidly reversed in 2015, and this time the media did not report the extreme violence used by the police during protests in São Paulo, Rio de Janeiro and Belo Horizonte. In just a few days, the movement was discredited and integrated into the triumphal narrative that the order produces about itself. In political life, as in physics, for every action there is a reaction, but in terms of human struggle the reaction rarely happens in the same direction, and its intensity is far from being proportional. That is why we must value the dis-instituting and constituent potentialities of inaction, as proposed by civil disobedience.

In the interpretation adopted in this article – according to which constituent power is closely related to dis-instituting power – civil disobedience, if considered beyond the limits of the traditional reformist and liberal interpretations, seems to be one of the most adequate mechanisms for thinking and acting in a dis-instituting way. Additionally, it has a vitally strategic advantage: it is not violent. Therefore, civil disobedience cannot be directly attached to the forms of State-capital action, which have an inherent need to monopolize violence.

Non-violence is central to the success of disobedient action opposed to constituted power, since the violent practices of social movements with reasonable demands are only used to justify the State’s most ruthless responses. The non-violent strategy does not only aim to rouse the opponent’s sense of morality – as Gandhi intended – but also attempts to turn public opinion against the State and, instead, favor the disobedient, who want to institute new political and legal structures (Estévez Araujo, 1994, p. 26). To such an argumentative-strategic perspective one needs to add the institutional aspect, according to which the use of violence by resistance organizations is strictly prohibited within constitutional democracies (Ebert, 1988, p. 93). The non-violent strategy makes it easier for civil disobedience to be seen as legitimate in the context of the constituted power it wishes to criticize and overcome.

Conclusions

As revealed by Costa Douzinas, the act of disobedience makes it possible to disassociate people’s actions, conduct and behavior from the capitalist economic matrix, centered on

consumption, debt and moral judgment which is imposed on the lower classes, who are continually asked to resist the harmful effects of the permanent economic crisis we live in. By questioning the alleged *continuum* between law and justice, disobedience no longer appears as an individual act of moralizing character, but rather as a collective and emancipatory social practice, capable of constituting new forms of subjectivity by removing the subject from the desire-consumption-frustration cycle (Douzinas, 2015, p. 175-176).

The ontological act of disobedience need not be organized by a political party, labor union or any other centralizing structure, being rather a movement centered on resistance and on the fight for the right to have rights. It is, therefore, the political starting point from which new forms of subjectivity may be constituted (Douzinas, 2013). It is vital to create restraint-free ways to perceive our social reality and being in the world, dismantling proprietary and hierarchical forms of subjectivity by deactivating the institutions which reproduce them daily. In order to accomplish this task, civil disobedience must play a central role. It must be embodied not only within the abstract ideas discussed here, but within concrete actions: abandoning work, promoting general strikes in public services, not paying taxes and fees, abstaining from voting on a large scale, eschewing the banking system, increasing co-operativism, etc.

In contradiction with her final thesis, Hannah Arendt indicates that civil disobedience, as an extra-legal phenomenon, has effective revolutionary potential. Having noted that all human societies change, being in constant flux – and thus in need of stability – Arendt states that the law can bring stability and normalize such changes *after* they occur, but that the changes themselves result from the action of extralegal potentialities (Arendt, 1972, p. 80); i.e., from something beyond the law, such as constituent power. Perhaps this is why – almost unwillingly – she arrives at a conclusion very similar to the one developed in this article, confirming that civil disobedience is one of the possible answers to the crisis in political and legal institutions. The state of economic exception has become the rule, and the daily emergency created by disaster capitalism cannot be overcome by a new global *nómos*, as predicted by Carl Schmitt, but rather by a deactivation that only the disobedient and his radical refusal can implement.

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